No. 95-2038

(3)

Supreme Court, U.S.
FILED
OCT 2 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOHN MINCIELI,
Petitioner,

--against--

AUDREY BRUDER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

NATHAN Z. DERSHOWITZ
DERSHOWITZ & EIGER, P.C.
350 Fifth Avenue
Suite 7912
New York, NY 10118
(212) 967-0667
COUNSEL OF RECORD

Victoria B. Eiger
Of Counsel

Attorneys for Petitioner
John Mincieli

6 pp

STATUTES INVOLVED

The statutes as set forth in the Petition for a Writ of Certiorari accurately quote the version of the Florida statutes that were in effect in 1989, at the time of the events at issue. Copyright dates of the West volumes from which the statutes were obtained were included, because that is the citation form suggested by The Blue Book: A Uniform System of Citation Respondent's charge that Petitioner misrepresented the law is therefore inaccurate.

I
QUALIFIED IMMUNITY: QUESTION OF LAW OR FACT

The Respondent's brief in opposition serves to highlight the importance of the issues this case presents for review. The Respondent appears to argue that the question of qualified immunity is always a question of law, to be determined by the court, and never a question of fact to be determined by the jury. In support, she cites Malley v. Briggs, 475 U.S. 335 (1986), arguing that it is instructive by its silence. Malley v. Briggs' silence on the question is just that: silence. It does not address the question of the proper allocation of decision-making functions between judge and jury. Malley does not shed light on whether traditional allocations do not apply to the question of qualified immunity in civil rights actions because of policy considerations that point in favor of determination of the issue at the earliest time possible. Nor does Malley -- or the Respondent -- answer Petitioner's claim that even if the law was clear, the allocation of decision making responsibilities must be re-evaluated in

light of this Court's recent decision in United States v. Gaudin, 115 S. Ct. 2310 (1995).

Respondent's argument that the issue is "academic" because the jury did not decide the question of qualified immunity is flawed. Although the jury was not given a special interrogatory which asked it to determine the issue of qualified immunity apart from the general question of liability, the jury was charged on the principles of qualified immunity, at some length. Among other things the jury was told:

> After considering the scope of discretion and responsibility generally given to a police officer in the performance of his or her duties and after you have also considered all of the surrounding circumstances of the case as they would have reasonably appeared at the time, if you find from a preponderance of the evidence that the defendant had a reasonable and good faith belief that her actions were not going to violate the constitutional rights of the plaintiff, then she cannot be found liable even if by her good faith actions the plaintiff's constitutional rights were, in fact, violated as a result of the defendant's behavior.
>
> In this regard, you are further instructed that actual probable cause is not necessary for an arrest to be objectively reasonable.

> The doctrine of qualified immunity protects law enforcement officers in cases in which they reasonably but mistakenly conclude that probable cause is present. (TR. IV-560-61).

The jury's affirmative answer to the question whether "the defendant violated plaintiff's constitutional rights by arresting him without probable cause, under the circumstances described by the Court in its instructions" (District court, docket item # 95, emphasis added) must have included a subsidiary finding rejecting the qualified immunity defense under the facts presented. That the qualified immunity question was not put to the jury separately, or directly, is of no moment[1]

Respondent's argument to the contrary notwithstanding, this case raises fundamental questions relating to the respective functions of judge and jury where the defense of qualified immunity is interposed, questions which continue to plague and to puzzle the courts that hear such cases. The Respondent's answer -- that "issues regarding the application of immunity, qualified or otherwise, in a civil rights context are questions of law for the court" -- has the virtue of simplicity, but it is not compelled by this Court's prior decisions, and, even it if

---

[1]The trial court's observation that the jury's verdict was "on the merits rather than on qualified immunity," see App. 10, n.5, is without basis, since the jury is presumed to have followed all portions of the charge it has heard, and not to have ignored any part.

were, it would bear reconsideration in light of Gaudin.

II
UNSETTLING OF "SETTLED LAW"

The question of what "unsettles" settled law for purposes of determining the existence of qualified immunity is itself a question that merits consideration.

Pointing to State v. James, 543 So.2d 288 (Fla. Dist. Ct. App. 1989), Bruder insists that the question whether intent to defraud is an element of the 319.33 offense was unsettled when she acted because, though prior cases had held that intent to defraud was an element of the crime, James held to the contrary. Bruder is correct that the James opinion is dated April 25, 1989 -- eight days before Mincieli was arrested -- but Bruder is wrong in arguing that James unsettled the theretofore well-settled law, and that it established Bruder's entitlement to qualified immunity from suit.

First, James did not hold that intent to defraud is not an element of the crime. James held that the statute went beyond intentional fraud directed at automobile dealers, and included fraud against the agency responsible for motor vehicle records. It therefore held that dismissal of the information, which alleged intent to defraud, was error. It was not until 1990, in City of Sweetwater v. Zaldivar, 559 So.2d 660 (Fla. Dist. Ct. App. 1990), that the Third District held that "no allegation or proof of intent to defraud is necessary to trigger the criminal sanctions attached to Section 319.33."

Second, even if the James decision had held that intent to defraud was not an element of the crime, it would not have unsettled the law as of the date of its issuance. Under Florida law, an appellate court's decision is not final -- is not "law" -- until the mandate has issued, which is ordinarily 15 days after the court rules. See Fla. R. App. Pro. 9.340(a); 9.140(a). Only upon issuance of the mandate does the appellate court's decision become final. State, Department of Health and Rehabilitative Services v. South Beach Pharmacy, Inc., 635 So.2d 117 (Fla. Dist. Ct. App. 1994), citing State ex rel. Davis v. Clearwater, 146 So. 836 (1933). Accordingly, Bruder's argument that the law was unsettled at the time of the acts complained of, and thus that she enjoyed qualified immunity, an argument that rested solely on James and a case decided well after all of the events at issue, should have failed.

CONCLUSION

For the reasons stated above, and in the Petition for a Writ of Certiorari, Petitioner respectfully prays that the Writ should be granted.

Respectfully submitted,

Nathan Z. Dershowitz
DERSHOWITZ & EIGER, P.C.
350 Fifth Avenue
Suite 7912
New York, New York 10118
212-967-0667

Counsel of Record
for Petitioner

Victoria B. Eiger, Of Counsel